[redacted]

NORFOLK SOUTHERN RAILWAY COMPANY,

Respondent.

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PETITION FOR A WRIT OF [redacted]
To the United States Circuit Court of
For the Fourth Circuit and
BRIEF IN SUPPORT THEREOF.

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THE BAKER LEGAL PUBLICATIONS CO., CLEVELAND, OHIO—[redacted]

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# In the Supreme Court of the United States

## No. . . . . .

**OCTOBER TERM, 1947.**

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BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, OCEAN LODGE NO. 76, PORT NORFOLK LODGE NO. 775, W. M. MUNDEN,

*Petitioners,*

vs.

TOM TUNSTALL,
NORFOLK SOUTHERN RAILWAY COMPANY,

*Respondents.*

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**PETITION FOR A WRIT OF CERTIORARI**
**To the United States Circuit Court of Appeals**
**For the Fourth Circuit.**

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*May it Please the Court*:

The petitioners herein are the Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76, Port Norfolk Lodge No. 775, and W. M. Munden.

The respondents herein are Tom Tunstall and Norfolk Southern Railway Company.

The petitioners pray that a writ of certiorari issue to review the judgment and decree of the United States Circuit Court of Appeals for the Fourth Circuit entered in the above entitled cause, numbered therein No. 5609, affirming the declaratory decree and judgment of the United States District Court for the Eastern District of Virginia at Norfolk.

## OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Fourth Circuit (R. 93....) is reported in .... F. 2d ...., and is also included in the appendix hereto. The opinion of the District Court (R. 25....) is reported in 69 F. Supp. 826.

## JURISDICTION.

The opinion and judgment or decree of the Circuit Court of Appeals were entered on August 20, 1947. The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347).

## STATEMENT.

This action undertaken by the respondent Tunstall on behalf of himself and all other colored firemen employed by the Norfolk Southern Railway Company, is an attack on an agreement executed on February 18, 1941, between the petitioner, Brotherhood of Locomotive Firemen and Enginemen, and the Southeastern Carriers' Conference Committee representing thirteen southeastern railroads and their subsidiary carriers, including the Norfolk Southern Railway. Also under attack is a supplemental agreement dated May 23, 1941, made with the Norfolk Southern Railway by a local officer representing the firemen's craft employed on that Railway, assuming to interpret certain of the terms of the February 18, 1941, agreement.

The Brotherhood of Locomotive Firemen and Enginemen is a national railway labor organization representing, for the purposes of the Railway Labor Act, the firemen's craft employed on the southeastern railroads. It will be referred to herein as "the Brotherhood."

To comprehend the questions posed for decision by this Court, a brief review of the circumstances giving rise to the February 18, 1941, agreement, and of its operational effect, is essential.

Nonpromotable firemen are those white firemen who are unable, because of physical or mental deficiencies, to pass, or who decline to take, promotion examinations to qualify as engineers, and also all colored firemen. The latter are nonpromotable because of the traditional policy adhered to by all railroads of not placing Negroes in the position of locomotive engineers. The effect of this policy has been the accumulation by nonpromotable firemen of long seniority. For this reason, they frequently occupy substantially all of the upper portion of the firemen's seniority roster and are thus enabled to command the more important and best paid passenger and freight firing assignments. (R. 174, 179)

Promotable firemen, on the other hand, generally occupy the lower portion of the firemen's roster, remaining there until such time as their services are needed as engineers, when they are promoted to the foot of the engineers' seniority roster, provided they are able to satisfactorily pass the promotion examinations. (R. 174..)

The avenue up the firemen's roster to promotion being thus often blocked by nonpromotable firemen, promotable firemen frequently reached the position of engineer with little or no opportunity to operate the locomotives and become familiar with the runs constituting the more important assignments. The effects of this deficiency in experience on the promotable firemen were cumulative. The burden of responsibility borne by the engineer of moving his train safely and on schedule was onerously increased. Owing to the inadequacy of practical experience, the effort at study and preparation required to pass the promotion examinations was measurably increased, and the penalty for failing to pass the tests (generally dismissal from the service) was suffered by the promotable men with greater frequency than would otherwise have been the case. In addition, owing to the fact that promotable firemen spend a substantial portion of their service life on the lower

portions of the firemen's and engineers' rosters, their earnings and working conditions are less favorable than those enjoyed by nonpromotable firemen. (R. 172.)

The grievances thus caused promotable firemen by the presence in substantial numbers of nonpromotable firemen led the Brotherhood, acting through its president, to negotiate the agreement of February 18, 1941, with twelve southeastern carriers and their subsidiaries. The esssential feature of this agreement is its percentage rule, which limits the number of assignments which nonpromotable firemen may hold to a maximum of fifty percent in each class of train service. This rule alleviates to some degree the promotable firemen's grievances, because it enables them to command at least a part of the assignments in each class of service while progressing up the firemen's roster to the point of promotion. (R. 164, 181)

The respondent Tunstall thereupon instituted the present action, predicating his attack upon the grounds that the Brotherhood, by negotiating the percentage agreement of February 18, 1941, had thereby failed and refused to fairly and impartially represent the colored firemen as was its duty under the Railway Labor Act; that it had acted in fraud of the colored firemen's rights in that it was "maliciously intending and contriving to secure a monopoly of employment and the most favored jobs for its own members." (Para. 9, Count II, of Complaint (R. 8...).)

Motions to dismiss predicated upon jurisdictional grounds were filed by the defendants and sustained by the District Court (opinion not reported) and by the Circuit Court of Appeals (140 F. 2d 35). These rulings were reversed by this Court (323 U. S. 210) and the cause remanded to the Circuit Court of Appeals for its decision on questions of service not theretofore resolved. These were ruled on adversely to the defendants (148 F. 2d 403), and the case remanded to the District Court.

Answers were filed on behalf of the defendants, following which requests for admissions were made on the de-

fendants and the deposition of Robert F. Cole, Secretary of the National Mediation Board, was taken at the instance of the plaintiff. A motion for summary judgment was then filed by the plaintiff, followed by similar motions on behalf of the defendants, supported by affidavits of defense.

On October 9, 1946, the District Court sustained plaintiff's motion for summary judgment and denied defendants' motions for summary judgment. The case was continued for hearing on the matter of damages. The question of damages was submitted to a jury on January 21, 1947, and a verdict in the amount of $1,000.00 was returned for the plaintiff against the Brotherhood.

The District Court entered its decree on January 21, 1947, declaring the plaintiff's rights and the Brotherhood's duties in the premises; enjoining the defendants from enforcing the agreements of February 18, 1941, and May 23, 1941, or interfering with the occupation of the colored firemen employed on the defendant Railway, or the enjoyment of their seniority rights as established by the rules and working conditions in effect on the defendant Railway, exclusive of the agreements of February 18, 1941, and May 23, 1941; also judgment for $1,000.00 was entered against the Brotherhood.

The Circuit Court of Appeals affirmed the judgment and decree of the District Court, predicating its decision on two grounds. *First*, it held that the two provisions contained in the May 23, 1941, agreement to the effect that the term "nonpromotable fireman" referred only to colored firemen, and that white firemen then employed would be called to take promotion examinations but if they failed to pass, or declined to take them, their seniority as firemen would not be affected by the percentage rule, established that the purpose and effect of the February 18, 1941, agreement was to eliminate Negro firemen from the service, and it could not, therefore, be a valid agreement within the principles enunciated by this Court in *Steele v. L. & N. R. Co.*, 323 U. S. 192, 202-203.

*Second*, it held that the agreement of February 18, 1941, was predicated upon conditions created by the discriminatory practice of the carriers in refusing to place Negroes in the position of engineers. This discrimination, in legal effect, permeated the agreement of February 18, 1941, resulting in its invalidity.

The questions presented by this petition are concerned solely with the validity of the terms and conditions constituting the agreement of February 18, 1941.

## QUESTIONS PRESENTED.

1. Does the Railway Labor Act or the Constitution preclude the Brotherhood, acting as the representative of the firemen's crafts employed on the southeastern railroads, from negotiating an agreement with these carriers limiting the assignments of nonpromotable firemen to fifty percent of the firing jobs available in each class of service as a means of alleviating the harsh employment conditions experienced by promotable firemen, caused by the presence of large numbers of nonpromotable firemen on the firemen's roster?

2. In view of the fact that the railroads since their inception have consistently declined to allow Negroes to be members of their engineer crafts, and that this rule or practice has created conditions in the firemen's crafts employed on the southeastern railroads which have been the source of serious grievances to the promotable firemen, is the Brotherhood prevented by its responsibilities as a representative under the Railway Labor Act from seeking to moderate these grievances by restricting the assignment rights of nonpromotable firemen?

3. Is a railway labor organization, acting as the bargaining representative of a craft or class under the Railway Labor Act, responsible in damages to members of the craft for losses caused them by an agreement which it negotiated in good faith with the carrier-employer, but

which ultimately is determined by the courts to be a violation of its statutory responsibility to members of the craft?

**REASONS FOR GRANTING THE WRIT.**

1. The Circuit Court of Appeals has erroneously decided questions of great public importance which materially affect the relationship between large numbers of employees on the southeastern railroads of the country and their employers.

2. The Circuit Court of Appeals has decided a federal question probably in conflict with the decision of this Court in *Steele v. L. & N. R. R. Co.*, 323 U. S. 192, and *Tunstall v. Bro. of L. F. & E.*, 323 U. S. 210.

3. The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is included in the appendix, and the citation to the reported opinion of the District Court appears in the petition.

### JURISDICTION.

The grounds on which the jurisdiction of this Court is invoked are stated in the petition.

### STATEMENT.

A statement of the case has been set forth in the petition and, in the interest of brevity, is not repeated here.

### STATUTE INVOLVED.

This case involves the construction of the Railway Labor Act as amended (Act of May 20, 1926, C. 347, 44 Stat. 577; Act of June 21, 1934, C. 691, 48 Stat. 1185; 45 U. S. C. Sec. 151 *et seq.*); and possibly the Fifth Amendment of the Constitution. Pertinent sections of the Act are set forth in the appendix hereto.

### SPECIFICATION OF ERRORS INTENDED TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that the Brotherhood, as the representative of the firemen's crafts on the southeastern railroads, violated its obligation to the nonpromotable firemen when it negotiated the agreement of February 18, 1941, with the Southeastern Carriers' Conference Committee.

2. In holding that the agreement of February 18, 1941, with the Southeastern Carriers' Conference Committee involved discriminations against nonpromotable firemen based upon race, and was for that reason invalid.

3. In failing to hold that the restriction on the right of nonpromotable firemen to bid for assignments established by the agreement of February 18, 1941, with the Southeastern Carriers' Conference Committee was reasonable and justified by the difference in employment conditions experienced by promotable firemen as a class and nonpromotable firemen as a class.

4. In holding that the Brotherhood is liable in damages to the respondent Tunstall.

5. In failing to hold that a nonprofit organization acting as a craft representative under the Railway Labor Act is not liable to members of the craft for losses suffered by them as a result of an agreement made by the organization in good faith with a carrier-employer, which agreement departed from the organization's statutory obligation to represent and protect the interests of all members of the craft.

## ARGUMENT.

The argument herein is not addressed to the merits of the case, discussion of the merits being reserved for petitioners' brief in the event the writ is allowed, but is directed to the support of the reasons for granting the writ.

**1. The Circuit Court of Appeals has erroneously decided questions of great public importance which materially affect the relationship between large numbers of employees on the southeastern railroads of the country and their employers.**

The outcome of this litigation will materially affect the working conditions and employment relationship of virtually all of the enginemen, colored and white, employed by the southeastern railroads.

The presence of substantial numbers of nonpromotable firemen (principally colored firemen) on the rosters of the

southeastern railroads has been the cause of excessive burdens and hardship for the promotable firemen. There were but two methods of alleviating the grievances of the promotable firemen. One method was to divide the available firing assignments between promotable and nonpromotable firemen on a basis that would assure promotable firemen opportunity to progress up the firemen's roster in a relatively normal manner, thereby enabling them to operate the locomotives and become acquainted with the runs in the more important passenger and freight assignments before being advanced to the responsibilities of engineer. This method involved imposing a restriction on the exercise of seniority rights by nonpromotable firemen.

The second method was to place all firemen, white and colored, promotable and nonpromotable, on a basis of complete equality—equality of responsibility and opportunity.

The first method involved the least interference with existing methods and operations. It was adopted in the agreement of February 18, 1941, between the Brotherhood and the southeastern carriers. If the decision of the Circuit Court of Appeals stands, it will have the effect of outlawing this method of alleviating the promotable firemen's grievances. Such a development would necessitate adoption of the second method. Granting equality to nonpromotable firemen will necessitate their taking the progressive examinations; standing for promotion in their regular turn; suffering the penalties normally imposed for failure to pass the progressive and promotion examinations (discharge from the service or demotion to the foot of the seniority roster); and assuming the usual responsibilities of an engineer for the safe and timely delivery of his train and the proper performance by the fireman of his duties. A minority of the nonpromotable firemen now employed may be assumed to be capable of meeting these conditions, but the vast majority are men of long seniority, of advanced years,

with little or no academic training, and are probably incapable of successfully passing the examinations and assuming the supervisory duties of an engineer.

Whichever method is ultimately employed to keep open the avenue of advancement to the top of the firemen's roster, the choice is a matter of vital concern to the enginemen employed on virtually all of the southeastern railroads, and to the public at large. The method employed will be determined by the outcome of this litigation.

**2. The Circuit Court of Appeals has decided a federal question probably in conflict with the decisions of this Court in Steele v. L. & N. R. Co., 323 U. S. 192, and Tunstall v. Bro. of L. F. & E., 323 U. S. 210.**

This Court, in construing the Railway Labor Act in the *Steele* case with a view to determining the character of agreements which a craft representative may make with a carrier, made the following statement:

> "This does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit. Cf. *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 509-510, 512 and cases cited; *Washington v. Superior Court*, 289 U. S. 361, 366; *Metropolitan Casualty Co. v. Brownell*, 294 U. S. 580, 583. Without attempting to mark the allowable limits of differences in the terms of contracts based on differences of conditions to which they apply, it is enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among

members of the craft discriminations not based on such relevant differences." (323 U. S. 192, 203.)

The petitioners contend that the Circuit Court of Appeals failed to weigh the uncontroverted facts of record in the manner required by this Court's statement of the law when determining the validity of the percentage agreement of February 18, 1941.

The judgments of the Courts below are predicated upon respondent Tunstall's motion for summary judgment. Under these circumstances there can be no dispute regarding the essential facts in this controversy. These facts establish beyond peradventure that the working conditions and responsibilities experienced generally by promotable firemen as a class differ materially from those experienced by nonpromotable firemen as a class. These petitioners contend that these differences are "relevant to the authorized purposes" (323 U. S. 192, 203) of the percentage agreement of February 18, 1941, and are consistent with this Court's interpretation of the Railway Labor Act as expounded in the *Steele* case regarding the authority of a craft representative to negotiate collective agreements.

The Circuit Court of Appeals rejected these facts as being without significance. This it did on the grounds that two interpretative provisions incorporated in the agreement executed May 23, 1941, between local representatives of the Norfolk Southern Railway and its firemen's craft "show(s) beyond peradventure" (R.78) that the agreement executed some three months previously (February 18, 1941) between the president of the Brotherhood and the Southeastern Carriers' Conference Committee was bottomed upon race prejudice. (The record does not disclose the origin of these interpretative provisions contained in the May 23, 1941, agreement. No contention will be made in this appeal that the decision of the Circuit Court of Appeals' holding that these provisions are unlawfully discriminatory was improper.)

By attaching a predominant and retrospective significance to the interpretative provisions of the May 23, 1941, agreement, while at the same time rejecting unchallenged facts that amply demonstrate a clear and logical relationship between existing employment conditions and the distinctions recognized between promotable and nonpromotable firemen by the percentage agreement of February 18, 1941, the Circuit Court of Appeals "has decided a federal question in a way probably in conflict with applicable decisions of this Court." Revised Rules of the Supreme Court, Rule 38 (5b).

**3. The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.**

The Circuit Court of Appeals, in sustaining the judgment for damages against the Brotherhood, held that it knew of no reason why "an organization which has used its power as bargaining agent in violation of the rights of those for whom it undertakes to bargain, and has thereby inflicted injury upon one of those whom it professes to represent, should not respond in damages for the injury so inflicted."

While the Circuit Court appears to be of the opinion that this question of liability was settled by this Court in the course of its decision in the *Steele* case, these petitioners do not believe that to be the situation.

There was before this Court in the *Steele* case only the plaintiff's complaint. There were no responsive pleadings and no evidence. The complaint charged, in substance, that the Brotherhood had violated its responsibility to the colored firemen by maliciously designing to rob the colored firemen of their jobs and secure them for its own members. (R 99.)

The rule governing responsibility of a craft representative for damages inflicted under the circumstances charged

in the complaint may be entirely different from the applicable rule when the representative's breach of responsibility is the result of a mistake of fact or law.

What this Court said in the *Steele* case regarding the responsibility of a representative for damages has, in petitioners' opinion, no application to the situation depicted by the record in the instant case. Support for this view lies in the fact that while this Court, speaking through the Chief Justice, did say that for a breach of duty by the representative, the Railway Labor Act "contemplates resort to the usual judicial remedies of injunction and award of damages *when appropriate* for breach of that duty" (323 U. S. 192, 207), the question of damages was not made an active issue in the former appeal of this case. It was not included in the issues argued to the Court either in briefs or orally. The Court in its terse treatment of the subject of the craft representative's responsibility for damages, did not conclude that damages may be awarded properly in all cases. It is implicit in the statement that the Act contemplates an award of damages for breach of duty only "when appropriate," that a member of the craft is not entitled to money damages in every instance where a breach of duty has been established.

Although the complaint charges the Brotherhood with malice, fraud and bad faith, the record contains no evidence so characterizing the Brotherhood's conduct. At most, the record discloses an erroneous selection by the Brotherhood of one method of alleviating the grievances of promotable firemen from two available alternatives. The *Steele* opinion, founded as it was upon a complaint similar to that in the *Tunstall* case, and alleging malice, fraud and bad faith, did not decide that damages were recoverable upon the facts here of record. Hence the question remains for determination.

Before the question of damages should be considered settled, a number of relevant factors ought to be weighed in

argument. One, among others, is the non-profit character of all railway labor organizations. Their only source of funds is the contributions of their members. It is illusory to speak of financial responsibility of the organization as such. The rank and file employee becomes the only source of financial responsibility when damages are imposed upon the organization.

Another factor is the absence of any specific rules or standards by which the craft representative may be guided when determining upon a course of action in the performance of its duties as representative. The Railway Labor Act is utterly unavailing for this purpose. This Court acknowledged this situation when it made the following observation in its opinion in the *Steele* case:

> "In both cases the right asserted, which is derived from the duty imposed by the statute on the bargaining representative, is a federal right *implied from the statute and the policy which it has adopted.* It is the federal statute which condemns as unlawful the Brotherhood's conduct. 'The extent and nature of the legal consequences of this condemnation, *though left by the statute to judicial determination,* are nevertheless to be derived from it and the federal policy which it has adopted.' " (Italics ours.) (323 U. S. 192, 204.)

Whether a particular agreement, or a proposed change of an earlier agreement, is valid or invalid; what constitutes adequate protection of an employee's interest, and what amounts to inadequate representation—these and similar questions can be answered only by the courts, after the representative has made the best guess of which it is capable as to its rights and responsibilities under the law, and has assumed the risk of later being found to have guessed wrong; this being the alternative to inaction and neglect of the employees' interests which uncertainty of the law tends to induce.

This question of the liability of railway labor organizations for losses caused by their failure to correctly judge

of their duties and responsibilities under the Railway Labor Act, and perhaps also under the Constitution, should be settled by this Court, because the apprehension of the imposition of a harsh rule of damages in the premises will have far-reaching effects on the performance by the employees' representatives of their duties under the Act.

## CONCLUSION.

It is respectfully submitted that a writ of certiorari should be issued.

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## APPENDIX A.

### Pertinent Provisions of the Railway Labor Act.

Sections 1 and 2 of the Railway Labor Act of May 20, 1926, C. 347, 44 Stat. 577, as amended June 21, 1934, C. 691, 48 Stat. 1185, 45 U. S. C. Secs. 151-163.

DEFINITIONS

SECTION 1. When used in this Act and for the purposes of this Act—

First. The term "carrier" includes any express company, sleeping car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however*, That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso.

The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or any of such activities.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this Act.

Third. The term "Mediation Board" means the National Mediation Board created by this Act.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission. The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the District Court of the United States for the District of Columbia; and the term "circuit court of appeals" includes the United States Court of Appeals of the District of Columbia.

This Act may be cited as the "Railway Labor Act."

### General Purposes

Section 2. The purposes of this Act are:

(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

### General Duties

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to

prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working condi-

tions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such cer-

tification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this Act shall be construed to require an individual employee to render labor

or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

## APPENDIX B.

### Opinion of United States Circuit Court of Appeals, For the Fourth Circuit.

No. 5609.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, AND OCEAN LODGE NO. 76, AND PORT NORFOLK LODGE NO. 775, AND W. M. MUNDEN, AND NORFOLK SOUTHERN RAILWAY COMPANY,
Appellants,

*versus*

TOM TUNSTALL,
Appellee.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.

(Decided August 20, 1947.)

Before PARKER, SOPER and DOBIE, Circuit Judges.

PARKER, Circuit Judge:

This is an appeal from the final judgment and decree in a suit by a Negro locomotive fireman employed by the Norfolk Southern Railway Company against that company and the Brotherhood of Locomotive Firemen & Enginemen to obtain a declaratory judgment, injunctive relief and damages. When the case was first before us, we were of opinion that, under recent decisions of the Supreme Court, there was a lack of jurisdiction in the federal courts to entertain it; and we accordingly affirmed a decision dismissing the case for lack of jurisdiction. 140 F. 2d 35. Our decision was reversed by the Supreme Court, and the case was remanded to us to consider jurisdictional questions arising out of service of

process. 323 U. S. 210. We thereupon held that there had been sufficient service of process to bring the defendants before the court and remanded the case to the District Court for further proceedings. 148 F. 2d 403.

When the case came before the District Court on the remand, both parties moved for summary judgment on the pleadings and affidavits filed. On the admitted facts, the Court entered judgment for plaintiff declaring that the defendant Brotherhood was the exclusive representative of the firemen employed by the defendant railway company for the purposes of collective bargaining under the Railway Labor Act; that it was the duty of the brotherhood to represent impartially and without hostile discrimination the plaintiff and the other Negro firemen, constituting a minority group denied membership in the Brotherhood; that the Brotherhood had violated this duty by negotiating with the railway company agreements of February 18, 1941 and May 23, 1941, which discriminated against Negro firemen and resulted in plaintiff's being removed from a run to which he was entitled by seniority; that the agreements were null and void in so far as they deprived plaintiff and other Negro firemen of seniority and employment rights; and that plaintiff had been illegally removed from his run and was entitled to be restored thereto. The defendants were enjoined from giving force or effect to the agreements in so far as they interfered with the occupation of plaintiff or of the class represented by him, and the defendant railway company was directed to restore to plaintiff his seniority rights in the run from which he had been removed as a result of the agreements. The case was reserved for hearing before a jury on the issue of damages, which were duly assessed at the sum of $1,000.00, representing approximately the difference between wages received by plaintiff and wages to which he would have been entitled at the rate prevailing on the run which had been improperly taken from him. The facts are fully stated in

the opinion of the District Judge. See 69 F. Supp. 826. Those which are pertinent may be briefly summarized as follows:

The Brotherhood represents all locomotive firemen employed by the defendant railway company for purposes of collective bargaining under the Railway Labor Act, having been selected as bargaining agent by a majority of the craft. Negro firemen, who constitute a minority of the craft, are not admitted to membership in the Brotherhood, but, nevertheless they must accept it as their bargaining representative, since it is the choice of the majority. Matters of great importance to locomotive firemen in the realm of collective bargaining are seniority rights and the right to promotion to the more highly paid position of locomotive engineer. Upon seniority depends the right to the more desirable runs and upon the right to promotion depends the possibility of advancing to the position of engineer. No railway company of the United States has ever employed a Negro as a locomotive engineer and the Negro firemen are recognized as non-promotable to that position. Other firemen, if they possess the requisite mental and physical qualifications, are given opportunity to stand examinations for promotion to engineer, but not Negro firemen; and, because they are not promoted, Negroes serve for long periods as firemen and the seniority thus acquired enables them to obtain some of the best paid and most desirable runs in the company's service.

The Brotherhood, as bargaining agent for all locomotive firemen in the Southeast, obtained from defendant railway and other Southeastern carriers, over their protest, contracts which had the effect of denying to a large number of Negro firemen desirable runs to which they were entitled by seniority and of giving these runs to white firemen. The Brotherhood accomplished this by contracts distinguishing between promotable and non-

promotable firemen. On March 28, 1940, it made a demand on the defendant railway company and other Southeastern carriers to modify existing working agreements so that only "promotable" men would be employed as firemen. The carriers refused to agree to this, saying:

> "As we understand this proposal, it is that the carriers parties to the conference obligate themselves that they will in future hire no non-promotable men. The effect of this would be to exclude from employment in our service perhaps a small number of white persons who, because of educational qualifications or physical handicaps, might not be promotable, and, in addition, would exclude from employment all colored persons, because, upon the properties represented by this committee, colored employees are not promotable to position of engineer. In our conference we endeavored to point out to you that we doubted the wisdom and fairness of making any such agreement as this, first, because it would restrict the field from which we might draw employees in the event of a labor shortage, and, second, because we did not feel that such a large proportion of the population of the territory which we serve should be completely banned from employment as firemen upon our properties. As we said to you, these people are citizens of the country; it is necessary that they make a living; colored people are patrons of the railroads, and, in our opinion, we should not by agreement entirely exclude them from employment in positions which they have occupied and filled over the years."

Notwithstanding this protest of the railroads, the Brotherhood insisted upon its position, contending that it was in the interest of efficiency in the operation of the railroads that experience as firemen be acquired by men who could be advanced to the more responsible position of engineer, and that it was not fair to recently promoted engineers, to require that when they had to serve as firemen, as they frequently did, they take the less desirable runs. The Brotherhood finally succeeded, on February

18, 1941, in obtaining a modification of existing agreements to provide that the proportion of non-promotable firemen should not exceed fifty per cent in each class of service established as such on each individual carrier and that, until such percentage was reached on any seniority district, only promotable men should be hired and all new runs and vacancies should be filled by promotable men. As a result of this last provision plaintiff was denied a desirable passenger run to which he was entitled by seniority.

That the purpose as well as the effect of this provision was to eliminate Negro firemen from the railroad service, and not merely to eliminate all who were non-promotable in the interest of greater efficiency in the service, is shown by the modification of the agreement made on May 23, 1941, which provides:

> "It is understood and agreed that the phrase 'non-promotable fireman' carried in paragraph 1 of the above quoted agreement *refers only to colored firemen.*
>
> "It is agreed that promotable firemen now in the service who are physically qualified and not otherwise restricted, who have heretofore been called for examination for promotion and failed, or who have waived promotion, will be called for examination for promotion between May 1 and May 15, 1942. *In the event such firemen fail to pass examination for promotion, or waive examination, their seniority as firemen shall not be affected.*" (Italics supplied.)

In other words, only a colored fireman, not a non-promotable white fireman, would be barred from employment because fifty per cent of the employees in that class of the service were non-promotable. Furthermore, white firemen could fail to pass examinations or refuse to take examination without affecting their seniority, and thus put themselves in position to take the positions from which the Negro firemen were excluded because "non-promotable."

On these facts we think that plaintiff was clearly entitled to the judgment entered. There was, unquestionably, discrimination by the bargaining agent based on race which falls squarely within the condemnation of the rule laid down by the Supreme Court in *Steele v. L. & N. R. Co.*, 323 U. S. 192, 202-203, where the Court said:

> "We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, cf. *J. I. Case Co. v. Labor Board, supra,* 335, but it has also imposed on the representative a corresponding duty. We hold that the language of the Act to which we have referred, read in the light of the purposes of the act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."

It is argued that the discrimination of the contract obtained by the Brotherhood was not based on race, but on "promotability" of firemen, which was a matter having direct relation to the good of the service as to which the Brotherhood could exercise its discretion without being called to account. The answer is that the modification of May 23rd quoted above, shows beyond peradventure that considerations of race were at the basis of the action taken, else why should non-promotable firemen be defined as colored firemen, and why should white firemen who failed to put themselves in line for promotion be protected in their seniority rights?

And quite apart from the purpose to discriminate shown by the quoted provision of the agreement of May

23rd, it is clear that a bargaining agent which denies membership to Negro members of a craft which it represents cannot justify in law or in reason the use of its power to force a contract from its employer, the effect of which is to discriminate against the Negro minority which it represents. The effect of racial discrimination is not avoided by basing it ostensibly on some other factor. In *City of Richmond v. Deans*, 4 Cir. 37 F. 2d 712, we held that a zoning ordinance which in effect discriminated on grounds of race would not be upheld merely because it was based on the legal prohibition of intermarriage, which was itself based on racial grounds. So here discrimination against Negro employees cannot be sustained merely because it purports to be based on promotability, which is itself based on race.

The fact that the railroads have discriminated against Negroes in the matter of promotability, does not justify the Brotherhood, which represents them as bargaining agent, in making a further discrimination based on that discrimination. Because the railroads do not permit Negroes to hold the position of engineer, is no reason why a bargaining agent representing them should use its bargaining power to deprive them of desirable positions as firemen which the railroads do permit them to hold. This seems so elementary as not to permit of argument. Such action by a bargaining representative clearly violates the rule laid down by the Supreme Court in the *Steele* case, *supra,* as to what is permissible in collective bargaining. The Court said:

> "This does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the

scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit. Cf. *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 509-510, 512 and cases cited; *Washington v. Superior Court*, 289 U. S. 361, 366; *Metropolitan Casualty Co. v. Brownell*, 294 U. S. 580, 583. Without attempting to mark the allowable limits of differences in the terms of contracts based on differences of conditions to which they apply, it is enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among members of the craft discriminations not based on such relevant differences. Here the discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations. Cf. *Yick Wo. v. Hopkins*, 118 U. S. 356; *Yu Cong Eng v. Trinidad*, 271 U. S. 500; *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337; *Hill v. Texas*, 316 U. S. 400."

It is argued that the Brotherhood may not be held liable for damages because it was given a discretion with respect to bargaining and because it is a non profit organization. No authority is cited to sustain this proposition, and we know of none. No reason occurs to us why an organization which has used its power as bargaining agent in violation of the rights of those for whom it undertakes to bargain, and has thereby inflicted injury upon one of those whom it professes to represent, should not respond in damages for the injury so inflicted. If liability were thought to be a subject of doubt in such case, we might find helpful analogy in the cases which hold to accountability an agent who has violated the duty which he owes those for whom he acts or in the cases which establish liability for interference with contract. It is not necessary, however, to go to these, as the Supreme Court in the *Steele* case, *supra*, has definitely ruled that such liability exists. See 323 U. S. at 207.

*Affirmed.*